v. *Beever and Hindes,* 33 Tex. Civ. App. 675; *Carter* v. *Harden,* 78 Me. 528; *Smith* v. *Williams,* 117 Ga. 782; *Hood* v. *Warren* (Ala., 1921), 87 So. 524. However, some courts express a willingness to abandon the older view where the subvendee sues on a warranty of food. In *Chysky* v. *Drake Bros. Co.,* 182 N. Y. S. 459, where the plaintiff sued for injuries resulting from a mouth infection caused by a wire contained in a cake of the defendant's manufacture which the plaintiff had purchased through a retailer, the court said: "* * * I am of the opinion that the implied warranty of the defendant of the fitness of the cake for human consumption extended to the ultimate consumer of the cake * * * and that the implied warranty inured to the benefit and protection of the plaintiff, although there was no direct contractual relation between the plaintiff and the manufacturer of the cake." Statements to the same effect are found in the following: *Tomlinson* v. *Armour,* 75 N. J. L. 748 (diseased meat); *Parks* v. *C. C. Yost Pie Co.,* 93 Kan. 334 (decayed pie); *Catani* v. *Swift & Co.,* 251 Pa. 52 (trichinae in meat); *Ward* v. *Morehead City Sea Food Co.,* 171 N. C. 33 (decayed mullets); *Davis* v. *Van Camp Packing Co.* (Ia., 1920), 176 N. W. 382 (diseased meat in baked beans). But when we analyze these cases we find only *Catani* v. *Swift & Co., supra,* holding that the implied warranty makes the manufacturer absolutely liable without regard to negligence. Even in that case the court relies on cases decided upon tort liability. In all the other cases above cited the element of negligence was possibly present, so that we cannot say the courts' decisions were not influenced thereby. In effect, then, these cases may go no further than the negligence doctrine of *Thomas* v. *Winchester,* 6 N. Y. 397, where the manufacturer was held liable to the third party consumer. See also 18 MICH. L. REV. 436. Public policy, however, may justify the extension of the manufacturer's liability upon the implied warranty in food cases.

TRIAL—INSTRUCTION ON A LOWER DEGREE OF CRIME WHEN THERE IS NO EVIDENCE THEREOF IS REVERSIBLE ERROR.—The defendant was indicted for murder and was convicted of involuntary manslaughter. The defendant moved for a new trial on the ground that it was error for the court to submit the issue of involuntary manslaughter when there was no evidence whatever to indicate that the killing was unintentional. *Held,* reversible error. *State* v. *Pruett* (N. M., 1921), 203 Pac. 840.

Whether or not an instruction on a lower degree of crime, when there is no evidence thereof, is reversible error is in conflict. The majority of cases hold that such an instruction is reversible error. *Jordan* v. *State,* 117 Ga. 405; *Dichens* v. *People,* 67 Colo. 409; *People* v. *Huntington,* 138 Cal. 261. The theory upon which these cases proceed is that an instruction should be based upon the evidence. Otherwise there would be the anomaly of a man convicted and punished for an offense which the evidence totally fails to show was ever committed by him. The minority of courts, however, hold that such an instruction is one of which the defendant cannot complain. *State* v. *Quick,* 150 N. C. 820; *Bennett* v. *State,* 95 Ark. 100. In the last

case cited the court said "the defendant cannot complain of instructions that allowed the jury to find him guilty of a lower degree of homicide than he was really guilty of under the evidence, if guilty at all." It would seem that the rule which confines the instruction strictly to the evidence is the better, for an instruction in regard to a lower degree of crime, when not warranted by the evidence, would operate as an inducement to sentimental jurors to convict of one of those grades when they should convict the accused of the higher or acquit him altogether.

TRUSTS—GRAIN COMPANY HELD TRUSTEE OF PROCEEDS FROM SALE OF MORTGAGED GRAIN DELIVERED TO IT.—Grain was delivered to D, a grain company, by one who had previously mortgaged it to P. P notified D of its mortgage and directed it not to sell the grain nor pay the mortgagor for it. But D later sold the grain, retaining the proceeds of the sale. The mortgagor later became bankrupt and the referee in bankruptcy obtained a court order requiring D to pay over to him these funds as the property of the mortgagor. In a suit by P it was *held* that D had become a trustee of the funds for P and as such was liable to P for the loss, for if it had disclosed the fact that it was a trustee it would have defeated the attachment by the referee in bankruptcy. *Bank of Brookings* v. *Aurora Grain Co. et al.* (S. D., 1922), 186 N. W. 563.

In a prior hearing in the same court, 43 S. D. 591, 181 N. W. 909, it had been held that the grain company was a gratuitous bailee, not a trustee, and consequently not liable because it could not question the legality of the process by which the grain was taken from it. The basis of this holding was that the mortgagee had consented to the sale by the grain company, so the latter had done nothing wrongful. There was consequently nothing on which to base an involuntary trusteeship. Two justices dissented, and on the rehearing, here noted, their opinion was adopted by the majority of the court as being 'in all things correct." This opinion seems to be based on the premise that the sale by the grain company was not with the consent of the mortgagee. If the sale was made in violation of the mortgagee's rights it was a conversion; if in recognition of them, the grain company voluntarily became a trustee of the proceeds for the mortgagee. It would, perhaps, have been clearer simply to call it a case of constructive trust based on conversion. See BOGERT, TRUSTS, § 37. The holding seems sound, although trust principles are applied to a somewhat unusual case.

UNFAIR COMPETITION—FURNISHING MEANS TO RETAILER.—Complainant made a liquid preparation of quinine with the bitter taste disguised, and colored and flavored by chocolate. Through salesmen it was submitted to physicians, who came to prescribe it and their prescriptions were filled by pharmacists to whom it was sold by the complainant. Later the defendant began to make the same preparation, as it had the right to do, and though it did not sell the preparation as the complainant's it carefully selected a chocolate which gave it the same flavor and color. By representing that it could be used in filling prescriptions for the complainant's "coco-quinine"